

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2022-188-EC - ORDER NO. 2023-150  
MARCH 27, 2023

Spectrum Southeast, LLC, Complainant v.	) ORDER DENYING
York Electric Cooperative, Inc.,	) REHEARING AND
Respondent, Petition to Determine Just	) RECONSIDERATION AND
and Reasonable Terms and Conditions for	) GRANTING PETITION FOR
Pole Attachment Agreement Pursuant to	) CLARIFICATION OF
S.C. Code Ann. § 58-9-3030	) ORDER NO. 2022-836

**I. INTRODUCTION**

This matter comes before the Public Service Commission of South Carolina (Commission) on two Petitions regarding Order No. 2022-836 (the Order) from parties to the proceedings in Docket No. 2022-188-EC. York Electric Cooperative, Inc. (York) and The Electric Cooperatives of South Carolina, Inc. (ECSC) (together, the Co-ops) filed a Petition for Rehearing, Reconsideration and Clarification of the Order (Co-op Petition), and the South Carolina Telephone Coalition (SCTC) filed a Petition for Rehearing or Reconsideration (SCTC Petition) (collectively, the Petitions for Reconsideration).

The Petitions for Reconsideration were filed pursuant to S.C. Code Ann. sections 58-9-1200, 1-23-310 *et seq.*, S.C. Code Ann. Regs. 103-825(A)(4), and other applicable rules and regulations of the Commission. For the reasons set forth herein, the Commission denies the Petitions for Reconsideration and Rehearing. However, the Commission grants

the Co-ops' Petition for Clarification, recognizing that further clarification of the Order is necessary.

## **II. PROCEDURAL HISTORY**

Spectrum Southeast, LLC (Charter) filed the original Petition (Charter Petition) in this matter on May 19, 2022. Charter requested that the Commission determine a single, legal question: whether the Broadband Accessibility Act (BAA or the Act) prohibits electric cooperatives from denying access to their utility poles based on construction standards that exceed those set forth in the National Electrical Safety Code (NESC).<sup>1</sup> Petition, ¶¶ 1, 44, 45, & 46(1). In response to the Charter Petition, the Co-ops filed a Petition to Intervene and Answer (Answer).

In their Answer, the Co-ops challenged the narrow ruling requested by Charter as “inconsistent with the Act.” Answer, p. 1. Rather than ruling on the specific legal question raised by Charter, the Co-ops requested the Commission hold a full evidentiary hearing on the matter. The Commission agreed.<sup>2</sup>

The hearing convened on September 26, 2022, and lasted two days. On November 15, 2022, the Commission made its determination after a thorough review of the law and the evidence in the record. The Order was filed on December 22, 2022.

The Petitions for Reconsideration were filed by the Co-ops and SCTC (the Petitioners) on December 30, 2022. Charter and AT&T South Carolina filed Responses in

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<sup>1</sup> The BAA incorrectly refers to the Code as the National Electric Safety Code. The correct name is the National Electrical Safety Code, according to NESC Chairman Witness Bingel. Hearing Exhibit 1.

<sup>2</sup> Following oral argument, the Commission denied Charter's Motion to Strike, which requested that the Commission strike portions of the Co-ops' Answer, asserting “[w]hether York believes its clearance requirements are ‘reasonable and nondiscriminatory’ . . . is immaterial and impertinent to the single specific issue raised in Charter's Petition.” Motion to Strike, pp. 6-7.

Opposition to the Petitions for Reconsideration on January 10, 2023. Oral arguments were held on January 12, 2023. At a regularly scheduled Commission Business Meeting on January 18, 2023, the Commission denied the Petitions for Rehearing and Reconsideration and granted the Co-ops' Petition for Clarification.

### **III. STANDARD OF REVIEW**

Section 58-9-1200 of the South Carolina Code of Laws provides for rehearing as follows:

After an order or decision has been made by the Commission, any party to the proceedings may within ten days after service of notice of the entry of the order or decision apply for a rehearing in respect to any matter determined in such proceedings and specified in the application for rehearing and the Commission may, in case it appears to it to be proper, grant and hold such rehearing.

S.C. Code Ann. § 58-9-1200 (2015).

Under Commission regulations, a Petition for Rehearing or Reconsideration shall set forth clearly and concisely:

- (a) The factual and legal issues forming the basis for the petition;
- (b) The alleged error or errors in the Commission order;
- (c) The statutory provision or other authority upon which the petition is based.

S.C. Code Ann. Regs. 103-825 (2012).

The Commission shall either grant or refuse an application for a rehearing within twenty days and a failure by the Commission to act upon such application within that period shall be deemed a refusal thereof. S.C. Code Ann. § 58-9-1200.

“The purpose of a petition for rehearing [or reconsideration] is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing [or reconsideration] is not just to have the case tried. . . a second time.” *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933); *see also Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Moreover, “[t]he purpose of a Petition for Rehearing is not intended as a procedure for rearguing. . . . [a] case merely because the non-prevailing parties disagree with the original decision.” *In re: BellSouth BSE, Inc.* Docket No. 97-361-C, Order No. 98-66, pp. 1-2 (February 2, 1998).

Rather, the purpose of reconsideration is to allow the Commission “to identify and correct specific errors and omissions in its orders.” *In re: Annual Review of Base Rates for Fuel Costs for South Carolina Electric & Gas Co.*, Docket No. 2017-2-E; Order No. 2017-339, p. 1 (July 18, 2017). As such, on reconsideration, “the question is whether, in the light most favorable to [the non-moving party], and with every doubt resolved in [its] behalf, the Complaint stated any valid claim for relief.” *In re: Alex Kadoshnikov, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent*, Docket No. 2020-218-E, Order No. 2021-299, 2021 WL 1821405, at \*1 (May 4, 2021).

It is well-established that the Commission’s findings are presumptively correct and have the force and effect of law. *In re: Docket No. 2021-143-E- Application of Duke Energy Process, LLC, for Approval of Smart \$aver Solar as Energy Efficiency Program, Docket No. 2021-144-E*, Order No. 2022-521, 2022 WL 3098539, at \*5 (July 29, 2022). To overcome that presumption, a petitioner must demonstrate that the Commission’s

findings and conclusions are clearly erroneous in light of the substantial evidence on the record as a whole. *See id.* at \*6; *see also In re: Cherokee County Cogeneration Partners, LLC*, Docket. No. 2020-263-E, Order No. 2022-60, 2022 WL 304988, at \*3 (S.C.P.S.C. 2022). Even if reasonable men might differ in the conclusion of the evidence, the Commission's finding “will not be set aside.” *Lark v. BiLo, Inc.*, 276 S.E.2d at 307; *see also, Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Conclusory statements that amount to general and non-specific allegations of error do not satisfy the requirements of the rule. *See In re: S.C. Pipeline Co.*, Docket No. 2003-6-G, Order No. 2003-641, p. 6 (“[A] conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support a [petition for reconsideration].”).

#### **IV. SUMMARY OF PETITIONS FOR RECONSIDERATION**

The Petitioners seek reconsideration of several distinct points in the Order. The Petitioners’ key concerns relate to whether NESC pole attachment clearance standards are minimum or maximum standards and whether access to the poles was denied. After consideration of each of the Petitioners’ arguments, the Commission denies the Petitions for Reconsideration for the reasons outlined herein.

##### **A. SCTC’s Petition for Rehearing or Reconsideration**

###### **1. Denial of Access to Poles**

SCTC asserts that “while Charter framed its ‘legal question’ as a denial of access, Charter provided no evidence that would support such a factual finding.” SCTC Petition, p. 1. We disagree.

SCTC is correct that Charter filed its Petition seeking a ruling from the Commission on a “limited, but critical legal question” under South Carolina’s newly adopted BAA. Charter Petition ¶ 1. However, Charter raised this request under S.C. Code Ann. section 58-9-3030(A)(2), which grants the Commission jurisdiction over disputes between electric cooperatives and communications service providers and the ability “to determine just and reasonable rates, terms, and conditions for the agreements.” Charter Petition, ¶ 16; S.C. Code Ann. § 58-9-3030(A)(2).<sup>3</sup> Based on this authority, the Commission granted the Co-ops’ request “to hear from the experts on the issue,” so that, instead of “interpret[ing] the BAA in a vacuum,” the Commission could “make a decision on issues of first impression raised under the BAA based on a fully developed record.” Order, p. 7.

Charter’s initial legal question also presented a factual consideration—the denial of access. After considering the fully developed record, as requested by the Co-ops, the Commission determined that Charter’s request to attach at the NESC pole attachment standard<sup>4</sup> had been denied. The Commission further concluded that York failed to support its increased clearance conditions as required by law. *See* S.C. Code Ann. § 58-9-3030(B)(2).

York’s clearance requirement is central to this proceeding, and there is no dispute that York *requires* communication service providers to attach at 84 inches and 18 feet.

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<sup>3</sup> SCTC repeatedly acknowledged the Commission had authority to determine the disputed terms and even requested the Commission to determine the parties’ pole attachment terms and conditions. *See* SCTC Post-Hearing Brief of The South Carolina Telephone Coalition (SCTC Brief), p.8 (stating the terms and conditions for the pole attachment agreement between Charter and York “is a factual determination for the Commission to make based on the evidence of record”).

<sup>4</sup> The NESC standard is 15.5 feet at the mid-span and 40 inches at the Communication Worker Safety Zone (CWSZ).

York’s CEO, Mr. Basha, specifically referenced the 84-inch neutral conductor clearance and 18-foot mid-span clearance as requirements in his testimony, and they are “different from the minimum clearances found in the NESC. . .” Tr. 229-231; Answer, p. 6 ¶ 12. Based on the Commission’s review, York refused to let Charter attach at 40 inches and 15.5 feet in the proposed agreement, denying Charter access to its poles at the NESC standard. *See* Order p. 4; Petition, ¶¶ 8, 17, 18.

Although there is an existing contract between York and Charter (the Parties)<sup>5</sup> that involves the increased standard, the existence of that contract does not preclude York from denying Charter access, at its requested point, in a new agreement.<sup>6</sup> As outlined in the Order, the Parties negotiated the pole attachment agreement for approximately six months, during which time “they were able to reach an agreement on all issues but one.” Petition, ¶ 18. The remaining issue—the imposition of York’s enhanced clearance standards—is the reason this case came before the Commission.

## **2. Make-Ready Costs**

SCTC alleges the Commission erred by considering Charter’s “make-ready” costs in its decision. We reject this claim.

The Order states that the Commission did not consider make-ready costs when making a decision, including regarding whether York’s standards were justified. Order, p.

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<sup>5</sup> The existing agreement between York and Charter is the 2004 Agreement. Petition ¶ 5.

<sup>6</sup> The BAA accounts for existing contracts by providing: “[e]xcept as expressly provided otherwise, nothing in this article alters, amends, or otherwise affects the provisions of any agreement that, as of the effective date of this article, addresses the attachment or placement of facilities by communications service providers on or in the poles or structures of an electric cooperative. S.C. Code Ann. § 58-9-3030(A)(1).

19. Therefore, there is no need to reconsider a determination that was not made in the first place. Further, nothing in the Order pre-determines any rights or obligations with regard to make-ready work.

### **3. The Interpretation of “to the Extent Not Prohibited by the NESC”**

SCTC believes the Commission incorrectly interpreted section 58-9-3030(A) of the BAA, which states that electric cooperatives must provide communications service providers with access “to poles, ducts, conduits to the extent not prohibited by the National Electrical Safety Code, and similar support structures. . . .” S.C. Code Ann. § 58-9-3030(A). Simply put, SCTC contends that “to the extent not prohibited by the [NESC]” only modifies conduits and not the other words listed in the sentence. SCTC Petition, p.4.

The Commission interprets the law differently, based on the clear, plain meaning of the language. As stated in the Order, under the “plain meaning rule,” when a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974).

The fact that the phrase “conduits to the extent not prohibited by the National Electrical Safety Code” is offset by commas does not change the plain meaning of the BAA or its general purpose. There is no apparent policy reason for the General Assembly to have restricted the BAA's reference to the NESC in section 58-9-3030(A) to just conduits. Moreover, it is not logical to apply the NESC only to attachments in conduits, which the Co-ops testified would cover a limited portion of York network. Tr. 256:23-259:7. Given



that conduits are located in York’s more urban territory,<sup>7</sup> limiting the BAA’s access mandate to conduits would undermine the statute’s overriding policy to promote “efficient” deployment of broadband facilities and services “at all locations in the State.” S.C. Code Ann. §§ 58-9-3000(B)(4), (5) & (7).

Section 58-9-3030(D)(2) of the BAA also references the NESC, and it requires communication service providers to cooperate in good faith with pole owners to ensure compliance with NESC standards. Specifically, “a communications service provider that has attached, or applied to attach, facilities on electric cooperative infrastructure and the electric cooperative must cooperate with the owner of the pole and all other attaching entities in good faith to *fully comply with National Electric Safety Code requirements for electric infrastructure attachments.*” S.C. Code Ann. § 58-9-3030(D)(2) (emphasis added). It is well understood that statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. *Jowers v. S.C. Dept. of Health and Env’tl Control*, 423 S.C. 343, 815 S.E.2d 446 (2018). When read together, sections 58-9-3030(A)(2) and 58-9-3030(D)(2) of the BAA reflect that NESC compliance involves all electric infrastructure and is not just limited to conduits.

Furthermore, the words in a statute must be construed in context. *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass’n*, 306 S.C. 339, 343, 412 S.E.2d 377, 379 (1991). “The Court may not, in order to give effect to particular words, virtually

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<sup>7</sup> According to Witness Basha, just over half of York’s facilities are underground, and as a general rule, the underground conduits are in the more developed areas of York’s system. Tr. 258: 9-24.

destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent.” *Creech v. S.C. Public Serv. Comm’n*, 200 S.C. 127, 138, 20 S.E.2d 645, 649 (1942). Based on the evidence in the record, we do not find that conduits deserve special significance regarding the NESC that would not also apply to poles, ducts, and other electric infrastructure. To interpret it this way would undermine the BAA’s objective to correct and eliminate discrepancies in access to broadband facilities and services and facilitate access to broadband services in unserved areas throughout the State. *See* S.C. Code Ann. § 58-9-3000 (B)(2) & (9).

The cardinal rule of statutory interpretation “is to ascertain and effectuate the intent of the legislature.” *State v. Pittman*, 647 S.E.2d 144, 161 (S.C. 2007). As the South Carolina Supreme Court has long held, “[w]hat the General Assembly says in the text of the statute is the best evidence of its intent.” *Aiken*, 839 S.E.2d at 99; *Grier v. AMISUB of S.C., Inc.*, 725 S.E.2d 693, 695 (S.C. 2012). In other words, “[w]here the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Aiken*, 839 S.E.2d at 99; *see also Eagle Container Co., LLC v. Cnty. of Newberry*, 666 S.E.2d 892, 895 (S.C. 2008) (“All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.”)

If we understand the BAA to mean exactly what it says, then one of the central goals of the Act is to efficiently deploy broadband access across the state. The General

Assembly found that: “[b]ecause the lack of broadband facilities and services in certain areas deprives citizens residing in those areas from access to opportunities, the State needs to take action to correct and eliminate discrepancies in access to broadband facilities and services.” S.C. Code Ann. § 58-9-3000(B)(2). Based on this clearly stated objective, we believe communication service providers have a right to attach their facilities on electric cooperative poles as long as the attachments are permitted by—that is, not prohibited by, or in full compliance with—the NESC, and there is no other prohibition in the law.

This result is logical. It is supported by the record and the policy objectives found within the statute. Otherwise, utilities would be prohibiting access where it would be permitted and in full compliance with the NESC. Accordingly, the most reasonable interpretation of the statute is that electric cooperatives cannot deny access based on standards that exceed the NESC without proper justification. Proper justification is found in section 58-9-3030 (B)(2), which is examined in more detail below.

Ultimately, we believe SCTC’s interpretation of the BAA regarding conduits and the NESC directly conflicts with a basic reading of the law and with the statute’s expressed policy to speed deployment of broadband to unserved areas of the state.

#### **4. Minimum vs. Maximum Standards**

The Order specifically finds that the NESC safety standards are minimum standards. However, SCTC argues the Commission’s directive that York must allow Charter to attach at the NESC minimum standard essentially makes the NESC standards maximum standards. This is false. The Order does not require all cooperatives to allow communications service providers to attach at the NESC minimum standards.

Only after an evidentiary hearing and a thorough analysis of the evidence did the Commission make a specific finding *in this case* that York had not met the requirements of section 58-9-3030(B)(2). Ultimately, “[i]n this case, there is no evidence in the record to support either an NESC prohibition or a reasonable exception.” Order, pp. 28-29. Therefore, based on the language of section 58-9-3030(B)(2), we find York is not entitled to an increased clearance standard under the law and must allow attachment at the NESC standard.<sup>8</sup>

SCTC’s concerns with the Commission’s Order do not amount to errors of law. The Commission’s conclusions are fully supported by the plain terms of the BAA, its stated policy objectives, and the compelling evidence in the record. Petitions for reconsideration are reserved for the Commission to correct manifest errors, and because we find no manifest errors in this case, SCTC’s Petition for Rehearing or Reconsideration is denied.

#### **B. Co-op’s Petition for Rehearing, Reconsideration and Clarification**

The Co-ops filed a Petition for Reconsideration that raises the same general concerns presented by SCTC’s Petition for Reconsideration. Each of the Co-ops’ assertions are addressed below, in the order in which they were presented.

##### **1. Minimum vs. Maximum Standards**

Like SCTC, the Co-ops assert that the finding that NESC standards are minimum standards contradicts with the finding that York must grant Charter access at the minimum NESC standard. We disagree.

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<sup>8</sup> Notably, SCTC “has not taken a position on whether or not York demonstrated that the specific clearance requirements at issue in this case were necessary for reasons of safety, reliability, and generally applicable engineering principles.” SCTC Petition for Reconsideration, p. 6.

These positions can be reconciled when you consider that while NESC standards are minimum standards, under section 58-9-3030(B)(2), York was not able to prove that its expanded clearance requirements were necessary for reasons of insufficient capacity, safety, reliability, and generally applicable engineering principles. Order, pp. 34-38. Therefore, *in this instance*, York cannot require Charter to attach at its expanded clearances. Further, it is reasonable to require York to allow Charter to attach at the NESC standard.

As stated above, the Commission made a specific ruling in this case after applying the evidence in the record to S.C. Code Ann. section 58-9-3030(B)(2). The BAA does not mandate the NESC as a maximum standard and allows cooperatives to impose standards that exceed the NESC for reasons set forth in the BAA. However, after arguing for, and being granted, the right to offer expansive evidence, York nevertheless failed to present any evidence to support its proposed departure from the NESC. Order, pp. 34-38.

After a full evidentiary hearing on the issues, requested by York, and based on the Commission's authority to determine just pole attachment terms, York must now allow Charter to attach at a reasonable clearance height, which we find to be the NESC minimum standard pursuant to the evidence in the record. *See* Order pp. 39-40, 44. As noted in the Order, the Commission has adopted a regulation to the same effect for electrical utilities subject to its jurisdiction. "Unless otherwise specified by the commission. . .the electrical utility shall use the applicable provisions of the latest edition, Part 2, of the [NESC] as minimum standards of accepted good engineering practice." S.C. Code Ann. Regs. 103-361.

Ultimately, we base our determination on section 58-9-3030(A), which allows the Commission to set just and reasonable terms and conditions; section 58-9-3030(B)(2) for the reasons outlined above; the evidence in the record supporting the NESC standard, including the compelling testimony of NESC Chairman Mr. Bingel and Mr. Lupino; and the overarching goals of the BAA.

## **2. Findings of Fact No. 6 and No. 7**

The Co-ops state the Commission committed an error of law in making Findings of Fact No. 6 and No. 7. They allege the Commission's reading of the statute constitutes legal error because it is inconsistent with the principles of statutory construction. We disagree.

The text of the BAA specifically provides that an electric cooperative "shall provide" communications companies "with nondiscriminatory access," which includes "the right to nondiscriminatory use of all easements and rights of way and to all poles, ducts, conduits to the extent not prohibited by the National Electrical Safety Code, and similar support structures owned or controlled by the electric cooperative." S.C. Code Ann. § 58-9-3030(A). Order, p. 27. The Co-ops request that the Commission reconsider Finding of Fact No. 6, which states "[t]he BAA allows communications service providers to make attachments to an electric cooperative pole as long as the attachment is not prohibited by the NESC," and issue an order clarifying that the BAA allows electric cooperatives to impose clearance requirements greater than those of the NESC where the cooperative has a reasonable and nondiscriminatory basis for the additional clearance requirements based on insufficient capacity, safety, reliability and generally applicable engineering principles.

Although we believe the current Finding of Fact No. 6 is supported by the record and a plain reading of the BAA, we agree to clarify the language to include reference to 58-9-3030(B)(2) to better reflect the analysis in the Order and to be consistent with Conclusion of Law No. 4. The clarification is discussed in more detail below.

Finding of Fact No. 7 states “Charter was effectively denied access to York’s poles when York declined to allow Charter to attach at the NESC pole attachment standard of 40 inches at the CWSZ and 15.5 feet at the mid-span.” Again, we do not believe this finding constitutes an error of law. Rather, we find it is supported by the evidence in the record as outlined herein.

### **3. Denial of Access to Poles**

As addressed above and in the Order, Charter initially asked whether the BAA prohibits Co-ops from denying access to their utility poles based on construction standards that exceed those set forth in the NESC. Petition ¶¶ 1, 44, 45, & 46(1). In the Order, the Commission addressed both 1) the narrow, legal question presented by Charter as well as 2) the broader controversy between York and Charter regarding terms and conditions. In doing so, the Commission interpreted the language in the context of the Act as a whole and relied upon sections of the BAA that provided specific guidance as to when a co-op may deny access to its poles. *See* S.C. Code Ann. § 58-9-3030(B)(2).

There is no dispute that York refused to enter a new pole attachment agreement with Charter without its heightened clearance standards. *See* Order p. 4; Petition, ¶¶ 8, 17, 18, Tr. 498.12:4. There is also no dispute that the Commission has jurisdiction to set reasonable terms and conditions for such agreements when parties cannot agree. S.C. Code

Ann. § 58-9-3030(A)(2). In this case and under its authority, the Commission found that York denied Charter reasonable pole access and mandated that access be provided at the NESC standard, while also encouraging the Parties to continue negotiating.

Therefore, the Co-ops' contention that the Commission failed to consider if a specific application had been denied is irrelevant; the access point required by York—and the denial of access at that location—is what is materially at issue. The Commission was called upon to determine whether York denied Charter access by imposing excessive clearance requirements in its proposed pole attachment agreement. The evidence supports the finding that Charter was denied access at the NESC clearance standard without sufficient cause, and the Commission is granted the authority to determine just and reasonable terms when such negotiations between parties fail.

After a thorough review of the record, we found that York's negotiation position violated the BAA and resulted in a denial of access. *See* Order, pp. 27-30 (explaining York's clearance requirements "impermissibly allow York to deny Charter access" where it otherwise could attach in full compliance with the NESC); Tr. 76.33:19-20, 280-81, 427, 498.58:11.522:10-12, 526:11-527:4 & 544:12-25.

The Co-ops also raise a Due Process argument, which the Commission concludes is unfounded. In the Petition, Charter mentions the word "deny" or "denial" no less than ten times. The Co-ops were on notice of the discussion regarding denial of access. Ultimately, York had a full and fair opportunity to present evidence that it had not denied access to its poles.



Furthermore, the entire purpose of this proceeding was for the Commission to evaluate whether the clearance requirements that York sought to impose during the Parties' pole attachment negotiations were unjust and unreasonable because they constituted an unlawful denial of access. *See* Petition ¶ 1. Charter challenges York's pole attachment clearance standards as a matter of law *and* argues York's clearance requirements constitute an effective denial of access, in violation of the BAA. Petition, ¶¶ 9-10. Charter submits—and we agree—that the denial of access occurred when York refused to allow Charter to attach at the NESC minimum clearance standards.

#### **4. Interpretation of S.C. Code Ann. § 58-9-3030(B)(2)**

The Co-ops assert that the action before the Commission is to determine just, reasonable, and nondiscriminatory rates for a new pole attachment agreement. In determining whether the agreement was just and reasonable, the Commission utilized section 58-9-3030(B)(2) for specific guidance in instances of denial of access. By its express terms, the BAA grants attachers an affirmative right to access poles “to the extent not prohibited by the” NESC, except where “insufficient capacity” or “safety, reliability, and generally applicable engineering principles” justify denying access. S.C. Code Ann. §§ 58-9-3030(A) & (B)(2); Order, pp. 25-26.

While we acknowledged that a utility could potentially depart from the NESC – and pointed to statutory grounds on which a utility could conceivably do so – we concluded on the evidence here that York's clearance standards were based on its future business needs rather than any valid consideration under the BAA. York's witnesses were simply unable to “articulate the reason for the 84-inch requirement” or provide “specific details”

about any alleged safety incidents. Order, pp. 35-36; Tr. 429:7-19 & 437:24-438:2. Petitioners point to no evidence on reconsideration that the Commission failed to consider or misunderstood, or that otherwise compels the Commission to “correct” any of these findings.

We believe Charter has met its burden by proving by a preponderance of the evidence that York’s clearance standard is unreasonable and in violation of the BAA in that York failed to prove the bases for denial of access under S.C. Code Ann. section 58-9-3030 B(2).

### **C. Conclusion**

We deny SCTC and the Co-ops’ Petitions for Rehearing or Reconsideration of Order No. 2022-836. As is the nature of a contested proceeding, parties will present differing evidence on points of contention to support their respective positions. Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of the fact are conclusive. *Holcombe v. Dan River Mills/Woodside Div.*, 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) citing *Sola v. Sunny Slope Farms*, 244 S.C. 6, 135 S.E.2d 321 (1964).

The Petitioners ask the Commission to reconsider evidence and arguments that have already been fully considered and rejected. The Commission already considered – and rejected – Petitioners’ claim that York should be permitted to impose clearance standards that exceed the NESC based on their business needs, rather than as justified by the BAA.<sup>9</sup>

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<sup>9</sup> See York Pet. p. 11 (alleging the Commission committed a manifest error in refusing to allow York to use its alleged future “capacity-planning” as a justification for denying access under the BAA); Order, pp. 34-35.

In doing so, the Commission considered – and rejected – York’s argument and evidence that its clearance standards were justified based on its capacity needs and other purported rationales.<sup>10</sup> The Commission also considered – and rejected – York’s contention that it did not deny Charter access to its poles as a result of its clearance standards, as the Commission found those standards were not justified.<sup>11</sup> The Commission further considered – and rejected – York’s assertion that the BAA’s references to the NESC only apply to conduits, not poles or other attachments.<sup>12</sup> Finally, the Commission determined that Charter’s make ready costs are not at issue in this proceeding and none of its findings or conclusions rest on any consideration of such costs.<sup>13</sup>

After reviewing each of the Petitions for Reconsideration, we find no reason to grant either Petition, as neither provides a compelling argument or novel base upon which the Commission should rehear the case or reconsider its findings. The preponderance of evidence, the law, and the policy of the BAA support the overarching findings and conclusions contained in the Order. Therefore, we deny the Co-ops’ Petition for Rehearing and Reconsideration and SCTC’s Petition for Rehearing or Reconsideration. We do agree, however, that certain findings can be clarified, and makes those clarifications below.

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<sup>10</sup> Order, pp. 34-35 (“We find that York’s business considerations[ ] do not satisfy” the requirements of the BAA.).

<sup>11</sup> See, e.g., Proposed Order Of York Electric Cooperative, Inc., And The Electric Cooperatives Of South Carolina, Inc. (York Brief) pp. 17-18; Order, pp.14, 30 & 34-38 (“Charter was effectively denied access to York’s poles when York declined to allow Charter to attach at the NESC” standards.)

<sup>12</sup> See, e.g., York Brief, pp. 7-9; Order, pp. 28-29 (“[It] is not logical to apply the NESC only to attachments in conduits.”).

<sup>13</sup> See, e.g., SCTC Brief, pp. 9-10; Order, p. 19 (“[T]he issue of make ready cost is not before the Commission.”).

## **V. PETITION FOR CLARIFICATION**

The Commission maintains its findings are supported by the evidence and consistent with applicable law but recognizes that certain language needs clarification to assist the parties in understanding the Commission's reasoning in this novel matter. As such, the Co-ops' Petition for Clarification is granted, and the Commission clarifies certain Findings of Fact and Conclusions of Law as outlined below.

## **VI. FINDINGS OF FACT**

Based upon a review of Order No. 2022-836, the Petitions of the parties, and the evidence of record, the Commission reaffirms and clarifies its Findings of Fact as follows:

1. The NESC clearance standard is a minimum and not a maximum standard.
2. Electric cooperative pole owners may deny communication service providers access to their poles under the framework created in S.C. Code Ann. section 58-9-3030 B(2).
3. In this case, Charter requested access to York's poles at the NESC minimum standard of 40 inches for the Communication Worker Safety Zone and 15.5 feet for the mid-span clearance.
4. In this case, York denied Charter's request to attach at the NESC standard.
5. In this case, York did not present sufficient evidence for the Commission to find that York's denial of Charter's request met the standard outlined in section 58-9-3030 B(2) of the BAA.

6. Based on the evidence presented in the case at hand, York must grant Charter access to its poles to attach at the NESC minimum standard unless other terms are agreed to through continued good faith negotiations.

## **VII. CONCLUSIONS OF LAW**

The Commission reaffirms and adds to its Conclusions of Law as follows:

1. The Commission concludes that the Broadband Accessibility Act provides the Commission authority to resolve disputes over pole attachment rates, terms, and conditions. S.C. Code Ann. § 58-9-3030(A)(2).

2. The Commission concludes Charter properly petitioned this Commission to determine the applicability of the BAA, including the limited legal question Charter raises in its Petition. S.C. Code Ann. Regs. 103-825.

3. The Commission concludes the BAA does not make NESC standards maximum standards.

4. The Commission concludes that the BAA prohibits York from denying Charter access to poles based on construction standards that exceed the NESC when it does not meet the requirements set forth in S.C. Code Ann. section 58-9-3030(B)(2).

5. The Commission concludes that York has not demonstrated that its pole attachment clearance requirement – an 84-inch clearance span standard and an 18-foot mid-span clearance standard – is necessary for the reasons set forth in S.C. Code Ann. section 58-9-3030(B)(2).

6. The Commission concludes the General Assembly’s stated legislative objective in passing the Broadband Accessibility Act was to facilitate access to broadband services in unserved areas throughout the State of South Carolina.

## **VIII. DISCUSSION OF CLARIFICATION**

### **A. Findings of Fact**

The Commission reaffirms the Order’s Findings of Fact Nos. 1-4, which address jurisdiction, the Parties, the Charter Petition, and the NESC mid-span and CWSZ clearance standards. The Commission also reaffirms Finding of Fact No. 9, which relates to the Co-ops’ Motion to Strike.<sup>14</sup> The Commission clarifies Findings of Fact Nos. 5-8, pursuant to the Co-ops’ Petition for Clarification, with the addition of the Findings of Fact (Nos. 1-6) above.

#### **1. Finding of Fact No. 5 (Maximum vs. Minimum Standards)**

Finding of Fact No. 5 in the Order states “[t]he BAA did not make the NESC standards for pole attachments maximum standards.” We clarify the Order to read as follows: “[t]he NESC clearance standard is a minimum and not a maximum standard.” In our view, this provides the necessary clarification of the point. Therefore, there should be no further question that the Commission interprets the NESC standards as minimum safety standards. We adopt this clarification based on the same reasoning we relied upon in the Order. *See* Order, pp. 17-23.

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<sup>14</sup> Findings of Fact Nos. 1-4 and 9 are not restated in this Order, but they are upheld and reiterated by the Commission by way of this Order.

## **2. Findings of Fact Nos. 6 & 7 (Denial of Access)**

The Co-ops request that Findings of Fact Nos. 6 and 7 be withdrawn and clarified. Finding of Fact No. 6 stated “[t]he BAA allows communications service providers to make attachments to an electric cooperative pole as long as the attachment is not prohibited by the NESC pole attachment standard.” We amend this Finding of Fact by clarifying that electric cooperative pole owners may deny communication service providers access to their poles under the framework created in S.C. Code Ann. section 58-9-3030 B(2).<sup>15</sup> We believe this restated finding more fully reflects the Commission’s position in its Order, which discusses the use of section 58-9-3030(B)(2) and provides a basis for expansion of the clearance standard.

Ultimately, York’s heightened clearance standards were not supported by the record, with inadequate evidence to support a finding of insufficient capacity or that safety, reliability, and engineering principles are improved by York’s clearance spans. Order, pp. 34-38. Therefore, electric cooperative pole owners may deny communication service providers access to their poles under the framework created in S.C. Code Ann. section 58-9-3030 B(2).

Finding of Fact No. 7 stated: “Charter was effectively denied access to York’s poles when York declined to allow Charter to attach at the NESC pole attachment standard of 40 inches at the CWSZ and 15.5 feet at the mid-span.” In order to clarify the Order, we split

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<sup>15</sup> Section (B)(2) of 58-9-3030 states a request to utilize poles may be denied only if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles, and those limitations cannot be remedied by rearranging, expanding, or otherwise reengineering the facilities, provided the communications service provider pays the reasonable and actual cost of the pole owner caused by its attachment. S.C. Code Ann. § 58-9-3030(B)(2).

the findings into two separate points. First, Charter requested access to York's poles at the NESC minimum standard of 40 inches and 15.5 feet. Second, York denied Charter's request to attach at the NESC standard. Based on the evidence in the record, we find that Charter was denied access to a specific clearance standard on York's poles without just cause.

### **B. Conclusions of Law**

The sole clarification to the Order's Conclusions of Law is the addition of Conclusion of Law No. 6, which addresses the policy objectives of the BAA. We believe a Conclusion of Law regarding the stated legislative objective of adopting the Act helps to clarify and support the Commission's determinations. The Commission's decision is based on the clear language found in the BAA, and the application of the relevant facts before the Commission. We believe York's interpretation of the BAA would undermine the BAA's clearly stated objectives.

Therefore, the Commission finds it necessary to highlight the legislative intent of the General Assembly in adopting the BAA, and the stated objective of expanding access to broadband in unserved areas of South Carolina. The Commission concludes the General Assembly's stated legislative objective in passing the Broadband Accessibility Act was to facilitate access to broadband services in unserved areas throughout the State of South Carolina.

This Order and Order No. 2022-836 constitute the Commission's decision regarding the Petitions and the evidence filed in Docket No. 2022-188-EC.




## IX. ORDERING PROVISIONS

### IT IS THEREFORE ORDERED:

1. The South Carolina Telephone Coalition's Petition for Rehearing or Reconsideration of Order No. 2022-836 is denied.
2. York Electric Cooperative, Inc.'s and The Electric Cooperatives of South Carolina, Inc.'s Petition for Rehearing, Reconsideration and Clarification of Order No. 2022-836 is denied as to the request for rehearing and reconsideration. The request for clarification is granted.
3. This Order shall remain in full force and effect until further action of the Commission.

### BY ORDER OF THE COMMISSION:



  
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Florence P. Belser, Chair  
Public Service Commission of  
South Carolina  
FOR THE MAJORITY

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**Commissioners Caston, Thomas, and C. Williams, dissenting.** The dissenting Minority undersigned Commissioners fully reaffirm and restate their dissenting Minority

Opinion in Order No. 2022-836<sup>16</sup>, dated December 22, 2022, as if the Minority Opinion is repeated verbatim herein. Order No. 2022-836, pp. 43-60. Unless there is a specific alteration, supplement, or difference stated in our Clarifying Minority Opinion (Clarifying Minority Opinion) herein below as a result of the Clarifying Majority Decision following post-order motions in this docket, we state our determinations through the Minority Opinion issued on December 22, 2022 in Order No. 2022-836 (Minority Opinion). *Id.*

We believe that the Majority in its decision, Orders No. 2022-836 and 2023-150, discriminates against York's members and other communication companies who have invested money and have pole agreements with York. The Majority Opinions of Orders No. 2022-836 and 2023-150 (Majority Decision) discriminate against York's member-customers because York has already invested members' money into bringing broadband to York's "unserved areas". The Majority Decision further discriminates against other communication companies because these companies have invested money into underground services and pole attachments under long held existing agreements. The Majority Decision does not seem to limit their decision to only "unserved areas."<sup>17</sup> The

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<sup>16</sup> The dissenting Minority Opinion in Order No. 2022-836 is located on pages 43 through 60 of Order No. 2022-836. The Majority Opinion is located on pages 1 through 43, ending at the signature line of the Order by the Chair on behalf of the Majority. Order No. 2022-836.

<sup>17</sup> While the BAA does not define "unserved area," the term "unserved area" is defined elsewhere in Article 23, Chapter 9 of Title 58 concerning regulated communication services provided by an agency, entity, instrumentality, or political subdivision of the State and the designation by broadband service providers of unserved areas in the State. South Carolina Code section 58-9-2610(G) provides that

(G) "Unserved area" means:

(1) within a county that is identified as a persistent poverty county by the United States Department of Agriculture, Economic Research Service pursuant to the most recent data from the Bureau of the Census, a nongovernment-owned communications service provider's territory within a 2010 Census tract, as designated by the United States Census Bureau, in which at least seventy-five percent of households have either no access to broadband service or access to broadband service only from a satellite provider; and

legislative findings of the General Assembly hold that the BAA is “reasonably related to the legislative *objective of facilitating access to broadband services in unserved areas throughout the State.*” (S.C. Code Ann. § 58-9-3000(B)(9) (Supp. 2022) (emphasis added). The Minority submits that Charter is using the broader goals of the BAA (which is to reach unserved areas so that “all” areas have access to broadband service) to attempt to gain access to York’s poles at standards that are different from their existing pole attachment contract. See, Hearing Exhibit No. 4, pp. 38-64 (EPB-14).

The Commission issued Order No. 2022-836 with a Majority Opinion on behalf of Commissioners Florence P. Belser, Chair; Delton W. Powers, Jr.; Thomas J. Ervin; and Justin T. Williams; and with a dissenting Minority Opinion by Commissioners Stephen M. Caston; Headen B. Thomas; and Carolyn L. Williams. Two (2) Petitions for Rehearing and/or Reconsideration were timely filed – one filed by the South Carolina Telephone Coalition (SCTC) for Rehearing or Reconsideration<sup>18</sup> and the other filed by Respondent York Electric Cooperative, Inc. (York) and Intervenor The Electric Cooperatives of South Carolina, Inc. (ECSC).<sup>19</sup> SCTC’s Petition for Reconsideration asserts that the Majority Opinion in Order No. 2022-836 is erroneous as “[t]here is no evidence in the record to

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(2) within any other county, a 2010 Census block, as designated by the United States Census Bureau, in which at least ninety percent of households have either no access to broadband service or access to broadband service only from a satellite provider.

For the purposes of this subsection, “household” has the same meaning as prescribed by the United States Census Bureau. S.C. Code Ann. §58-9-2610(G) (2015).

<sup>18</sup> The South Carolina Telephone Coalition filed a Petition for Rehearing or Reconsideration on December 30, 2022. (SCTC Petition for Reconsideration).

<sup>19</sup> On December 30, 2022, York Electric Cooperative, Inc. and The Electric Cooperatives of South Carolina, Inc. filed a Petition for Rehearing, Reconsideration and Clarification of Order No. 2022-836. (York/ECSC Petition or Co-op Petition)

support the Commission’s finding that York Electric Cooperative, Inc. (York) denied Spectrum Southeast, LLC (Charter) access to York’s poles.” SCTC’s Petition for Reconsideration, p. 1. In fact, as SCTC quotes from Charter’s Petition to Determine Just and Reasonable Terms and Conditions for Pole Attachment Agreement Pursuant to S.C. Code Ann. §58-9-3030 (Charter’s Initial Pleading), filed May 20, 2022, “[f]or decades,” Charter states that it “and its predecessors-in-interest have relied on access to York’s poles to provide communications services to South Carolina residents and businesses throughout the utility’s service area.” Charter’s Initial Pleading, p. 3, ¶5. SCTC further asserts that “[t]his case was not about access to poles; it was about reasonable terms and conditions for pole attachments, and (at least in Charter’s mind)<sup>20</sup> who would bear the cost of any requirements that exceed NESC standards.” SCTC’s Petition, p. 2. Additionally, SCTC asserts in its Petition that “Charter did not bring this action to gain access to York’s poles. It already had access. Charter’s goal was to get York and others to pay Charter’s make-ready costs for its competitive entry into a market that the record shows is already served by other providers.”<sup>21</sup> *Id.*, p. 3.

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<sup>20</sup> SCTC argued in its Brief at pp. 8-10, and the Commission apparently agreed, that make-ready costs are not properly before the Commission in this case. See Order No. 2022-836 at p. 19 (“Although the issue of make-ready cost is not before the Commission ...”)

<sup>21</sup> Footnote 8 states:

*See* Tr. at p. 376 (York serves about 68,000 customers, of whom approximately 4,800 are unserved); *see also* Tr. at pp. 206, 300-302 (York tried to encourage all companies to provide internet service to York’s unserved customers, but the response was that it was not cost effective); Tr. at p. 217.2, line 19 through p. 217.3, line 3, and p. 217.6, line 14 through p. 217.7, line 8 (York has entered into an agreement whereby broadband facilities are being extended to serve the remaining unserved areas.) As previously argued, Charter is hiding behind the public policy of the BAA (which is to reach unserved areas so that ‘all’ areas have access to broadband service), while at the same time complaining about poles that are already being used to provide broadband service. *See* SCTC Brief at p. 4. As York witness Basha testified, York’s service area includes areas of explosive growth as well as more rural areas, and broadband providers, including cable companies like Charter, have been

York and ECSC also included a request for clarification of Findings of Fact Numbers 6 and 7, and related matters, in Order No. 2022-836 if the Commission does not grant rehearing and/or reconsideration. York and ECSC assert that the Majority contradicts its findings that the BAA does not adopt the NESC as a maximum standard when finding that “...an electric cooperative has no right to deny any attachment that complies with the NESC” standards and ruling “that an electric cooperative may not impose clearance requirements greater than those of the NESC.” York/ECSC Petition, p. 3. We agree that there is no reconciliation between the Majority’s conclusions that the NESC is not a maximum standard and that an electric cooperative cannot impose a greater standard than the NESC. The net ultimate effect of such conclusion results in the NESC standard becoming a de facto maximum standard for all practical purposes, which is not what the General Assembly intended. See, Minority’s Discussion of Statutory Construction, Order No. 2022-836, pp. 49-51.

The respective Petitions of SCTC and of York and ECSC seek rehearing, reconsideration, or clarification of certain matters decided in the Majority Opinion and not the position and rulings in the Minority Opinion in Order No. 2022-836. Pursuant to S.C. Code Ann. § 58-27-2150, a party may apply to the Commission for a rehearing in respect to any matter determined in the proceeding. “The purpose of the petition for rehearing and/or reconsideration is to allow the Commission the discretion to rehear and/or reexamine the merits of issued orders, pursuant to legal or factual questions raised about

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drawn to areas where growth has taken place, while leaving the less dense areas unserved.  
*See* Tr. at p. 217.6-217.7.  
SCTC’s Petition for Reconsideration, p. 3, fn 8.

those orders by parties in interest, prior to a possible appeal.” *In re: South Carolina Electric & Gas Co.*, Order No. 2013-5 (Feb. 14, 2013). S.C. Code Ann. Regs. 103-825 (A)(4) provides that a Petition for Rehearing or Reconsideration shall set forth clearly and concisely the factual and legal issues forming the basis for the petition, the alleged error or errors in the Commission Order, and the statutory provision or other authority upon which the petition is based.

The Clerk of the Commission noticed oral arguments on these motions for the later of January 12, 2023 at 3:00 p.m., or upon the conclusion of the Commission Business Meeting scheduled to begin at 2:00 p.m. Following oral arguments, the motions for rehearing and/or reconsideration were then denied by a Majority vote of four (4) to three (3) by the Commission on January 18, 2023.<sup>22</sup> The Majority has provided its above Clarifying Majority Opinion, and Commissioners Caston, Thomas, and C. Williams, as the dissenting Minority, provide this Clarifying Minority Opinion.

In this Docket, the Minority disagrees with the Majority Opinion, and Clarifying Majority Opinion, except for the determination in Order No. 2022-836 that “[t]he Broadband Accessibility Act [BAA] does not make the pole attachment clearance standards found in the National Electric Safety Code [NESC] maximum standards.” Order No. 2022-836 at p. 42. However, in clarifying our concurrence on this point – that the BAA does not make pole attachment standards in the NESC maximum standards –, we

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<sup>22</sup> The four (4) Commissioners voting to (a) deny the Petition for Rehearing and/or Reconsideration by York and ECSC and by SCTC; and (b) to clarify Order No. 2022-836 are Commissioners Belser, Powers, Ervin and J. Williams. Commissioners Caston, Thomas, and C. Williams are the three (3) commissioners in the Minority voting against the motion presented to deny these petitions for rehearing and/or reconsideration of the Majority Opinion in Order No. 2022-836.

disagree with any finding, holding, or interpretation of law by the Majority that would be inconsistent with our stated position, findings, and conclusions in our Minority Opinion. The Minority disagrees with the Majority on the conclusions and holdings that York is not entitled to implement an increased clearance standard under the law, and that York is required to allow attachment to its poles if the NESC standard is met by a communications service provider or other entity offering services other than electricity to consumers.

The issue of safety (both public and worker safety), engineering, and reliability related to pole attachments were specifically addressed by York Witness Ernest Paul Basha, Jr (Paul Basha or Basha) who provided detailed testimony and exhibits showing the policies in place since around 2000, as well as addressing the mischaracterizations by Charter witnesses of the relations between York and other communications providers.<sup>23</sup> The testimony and evidence in the Record not only demonstrates that York complies with the BAA<sup>24</sup> but also conveys that York's required pole attachment clearance standards meet the requirements for electric worker safety zones and protect non-electric line workers who

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<sup>23</sup> Basha specifically testified that:

Charter witnesses have mischaracterized the relationship between York and Comporium. The photographs attached to ...[Charter Witness Richard] Lupino['s] rebuttal testimony as Exhibit RL-1 [Hearing Exhibit No. 9] are photographs of fiber optic cable constructed and owned by York. Those facilities are not owned by Comporium. They are part of an effort that York has initiated to provide broadband service to our members living in the more rural parts of our service area where the existing broadband service providers – including Charter and Comporium – have not provided service. . . . York entered into an agreement with Comporium in late 2020 by which York would build fiber optic cable to extend broadband in rural areas and Comporium would use that fiber to offer and provide broadband service to York members and others in those areas. Tr. pp. 217.2:12-217.3:3.

Those photographs are of York facilities installed by York on its poles. The fiber optic cables shown in those pictures were installed by York in the 'electric space' on its poles as part of the York system. Tr. p. 217.4:12-14. *See also*, Hearing Exhibit No. 9.

<sup>24</sup> See Tr. pp. 217.3:6-217.4:8 (York uses the same clearance requirements that are required for pole attachments across providers).

are not certified to work within the electrical zone. Tr. pp. 190:16–192:1; pp. 197:14–198:14; pp. 199:21–206:16; pp. 207.1–207.15.

While Charter and York were unable to negotiate a new pole attachment agreement to modify their existing pole attachment agreement in Hearing Exhibit No. 4 (EPB-14), Charter continues to have access to the utility poles of York under the current agreement between Charter and York. There is no denial to access; in fact, Charter had no issue with the clearance standards for pole attachments used throughout York’s service territory provided Charter is not paying for compliance. The issue is about cost and who bears the costs for compliance with the clearance standards used throughout York’s service territory.<sup>25</sup> As witness Paul Basha explained in his testimony, there are multiple reasons why York instituted certain clearance requirements that are greater than the minimum requirements of NESC for pole attachments which included actual experience and non-discriminatory application of a safety standard to protect the integrity, safety and reliability of York’s electric distribution system.<sup>26</sup> *Id.* Mr. Basha testified that “the 84-inch neutral conductor clearance grew out of a need to efficiently manage the significant membership growth in our service territory, to minimize the upgrade and make-ready work for both the cooperative and its pole attachers, reduce safety hazards for communications workers, and to address attachers’ persistent contractual compliance issues.” Tr. p. 204.5:11–15. With

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<sup>25</sup> Tr. pp. 29:10–30:7; pp. 45:13–46:12; pp. 47:5–49:15; and pp. 217.8:10–217.9:20.

<sup>26</sup> Witness Basha testified that York changed its clearance requirements around year 2000. Tr. p. 207.4:7–12. The clearances “are 84 inches between York’s neutral conductor and the facilities of the attaching communications provider and the installed mid-span clearance requirement of 18 feet from surface of the ground.” Tr. p. 207.4:15–17. “Before this change we required a minimum 40-inch clearance between the neutral conductor and the communications cable and a minimum 15.5-foot mid-span ground clearance. It was our expectation that communications providers would follow the NESC in making sure that their attachments would meet these requirements.” Tr. pp. 207.4:20–207.5:2.



each new service request of a new cooperative customer member, York is required to install a transformer and service conductors on the closest pole.

For any pole on which we need to install a transformer and service conductors where there is a communications line attached at 40 inches below the York neutral conductor, the communication line has to be moved to allow the appropriate space between the bottom of the transformer and service conductor and the communication facility. For the temporary construction power, it is our practice, and our members' expectation, that facilities necessary to provide service will be installed in less than a week. Communication conductors in our supply space only 40 inches from the neutral adversely impact our ability to meet the construction power deadlines while also creating significant make ready work for the cooperative. If the communication lines are not moved then communications workers accessing those lines will be working too close to our facilities, creating a dangerous situation for the communications workers who are not trained to work in close proximity to our lines. But for the communications lines being too close to our facilities, none of these extra cost and delays would be encountered.

Tr. p. 207.6:1-14; See also, Hearing Exhibit No. 3, p. 11 (Exhibit EPB-8) (diagram showing dangerous situation with a 40-inch clearance when installing a 36-inch transformer without moving the communications line); Hearing Exhibit No. 3, p. 1-10 (Exhibit EPB-1 thru Exhibit EPB-7). Additionally, Mr. Basha further testified about the problems existing prior to York's clearance changes in 2000, the failures of telecommunications companies to meet contractual obligations, and the safety and reliability risks. Tr. pp. 207.7:3-207.13:1.<sup>27</sup> In

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<sup>27</sup> Mr. Basha testified that:

On a number of occasions these lines were caught by vehicles traveling beneath them that pulled our poles down. One incident stands out in my memory. A truck caught a low-hanging communications line and pulled three of our poles down. The incident caused a significant outage, measured both by the number of members who were affected and the duration of the outage. The repairs were performed as quickly as we could by York employees and were expensive. When we tried to get reimbursed for those costs, we were ignored at first, then eventually we were told that the incident was the fault of York since we should have caught the low sagging line on an inspection. We did not agree with that contention and thought that it showed a lack of responsibility by the communications company that was typical of some of them. Tr. p. 207.11:5-14.

fact, Mr. Basha explained to the Commission the efforts by York over the past ten (10) to fifteen (15) years to urge the providers to offer broadband service to York customer-members and the problem has been that this rural area did not meet the communications provider business plan of home density to invest in servicing all areas. With regard to broadband expansion, York reached out to various broadband providers, including Charter, and “the responses we have received from those companies has been that their business plans require a certain minimum density – homes passed per mile, is my understanding – that simply isn’t met in the rural parts of our territory.” Tr. p. 207.13:9-12. There was never any mention of concern related to the York clearance requirements of 84 inches between York’s neutral conductor and the installed mid-span clearance requirement of 18 feet from surface of the ground. Tr. p. 207.13:17-18; p. 207.4:15-17. York even demonstrated through evidence in the record that the problems experienced by York prior to its changing to higher clearance requirements in 2000 still exist today; in fact, Mr. Basha provided a specific example of such problematic encounter with Charter from January 2021. Tr. p. 207.14:1-14; Hearing Exhibit No. 3, p. 1-4 (Exhibit EPB-1).

The BAA clearly grants flexibility for the electric cooperative to consider safety, reliability and engineering standards with regard to its pole attachment agreements. Section 58-9-3030(B)(2) states:

A request to utilize poles, ducts, or conduits under this section may be denied only if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles, and those limitations cannot be remedied by rearranging, expanding, or otherwise reengineering the facilities, provided the communications service provider pays the reasonable and actual cost of the pole owner caused by its attachment.

S.C. Code Ann. section 58-9-3030(B)(2) (Supp. 2022). We believe that York's 84-inch and 18-foot clearances are just and reasonable. York implemented its clearance changes, or construction engineering standards, for reasons of safety, reliability, and in accordance with generally applicable engineering principles. See, Hearing Exhibit No. 3, p.11 (Exhibit EPB-8).

The purpose of Charter's Initial Pleading before the Commission requested a finding that the clearance requirements referenced in the NESC are maximum standards, rather than minimum safety standards. At all times, there is an existing pole attachment agreement between Charter and York providing access to York's poles as provided in Hearing Exhibit No. 4, pp. 38-64 (EPB-14). Charter agreed to be bound by the rules and practices of York including the standards for attachment, as well as any changes that York may adopt. Hearing Exhibit No. 4, pp. 39-40, 55-59 (EPB-14). Any ruling by the Majority that Charter is denied access by York cannot be reconciled with the evidence of record demonstrating that Charter has access and does use York's poles. See, Hearing Exhibit 3 & 4.

The BAA never intended to expand, change, or alter authority unless specifically stated.<sup>28</sup> "Except as expressly provided otherwise, nothing in this article alters, amends, or otherwise affects the provisions of any agreement that, as of the effective date of this article

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<sup>28</sup> SECTION 6 of Act No. 175 of 2020 states:

This act does not convey or confer any implied or express grant of authority to an investor-owned electric utility to provide broadband facilities or broadband services as defined in this act and any legal rights which may or may not belong to investor-owned electric utilities to provide broadband facilities or broadband services at the time of the passage of this act are neither expanded nor contracted by its passage.

[September 29, 2020], addresses the attachment or placement of facilities by communications service providers on or in the poles or structures of an electric cooperative.” S.C. Code Ann. section 58-9-3030(A)(1) (Supp. 2022). Charter can seek to negotiate an agreement with York which would address new placements, but not any facilities that were attached or placed prior to the date of the written request to negotiate.

Section 58-9-3030(A)(2) states:

Notwithstanding item (1), a communications service provider may submit to an electric cooperative a written request to negotiate agreements addressing the attachment or placement of facilities, after the date of the written request, by the communications service provider on or in the existing or new poles or structures of the electric cooperative. Unless the communications service provider and the electric cooperative agree otherwise, such agreements must not address facilities that were attached or placed prior to the date of the written request to negotiate. The parties must negotiate in good faith for at least sixty days after the written request, after which either party may petition the commission to determine just and reasonable rates, terms, and conditions for the agreements. The commission must make such determination within one hundred eighty days of the filing of the petition for that determination and the commission's determination must apply retroactively to all facilities attached or placed between the date of the written request to negotiate and the date of the commission's determination.

S.C. Code Ann. section 58-9-3030(A)(2) (Supp. 2020).

While in general we disagree with the entirety of the Majority Opinion unless specifically agreed herein the Minority Opinion, we do specifically disagree with the Majority’s Clarifying Opinion, discussion, and resulting conclusions and findings in Sections IV.A.3, IV.A.4, IV.B.1-.3; IV.C, V, VI.2-.6, VII, VIII, and IX, of Order No. 2023-150.

We disagree with the Majority that Charter has been denied access to attach to York’s poles and the ability to offer services to the customers and members of York’s

service territory. See IV.A.1 of Order No. 2023-150. As more fully explained in our Minority Opinion in Order No. 2022-836, dated December 22, 2022, we believe that the record clearly demonstrates that Charter (including its predecessor companies) has had access to York's poles to provide communication services to South Carolina residents and businesses within York's service area. *Id.*, ¶ 5; see also Hearing Exhibit No. 3 (EPB Exhibits No. 13 & 14); Order No. 2022-836, pp. 43-60. In the existing agreement dated January 1, 2004, Charter and York agree to use construction standards requiring attachments to York's poles shall maintain a minimum 18-foot clearance height at any mid-span and also to be a minimum of 7-feet<sup>29</sup> from York's primary neutral conductors. *Id.* at Exhibit A, p. 2; see, also Hearing Exhibit 3 (EPB Exhibit No. 8). During the hearing, the evidence of record shows that York uniformly uses these same construction standards in its pole attachment agreements with communication service providers throughout its territory. Tr. 207.8:15-207.9:3.

As we discussed in our Minority Opinion, the Commission was presented with a limited legal question by Charter. We continue to assert, opine and conclude that:

- (1) The Clarifying Opinion of the Majority in Order No. 2023-150 also goes beyond the scope of the Petition filed by Charter on May 19, 2022, as did the Majority Opinion in Order No. 2022-836;
- (2) The burden of proof continues to belong to Charter, which brought the Petition,
- (3) For reasons further discussed by the Minority in its Opinion, Charter did not meet its burden of proof; see Order No. 2022-836, pp. 51-55; *Palmetto All., Inc. v. S.C.*

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<sup>29</sup> Throughout the record, this clearance requirement was often referred to interchangeably as 84-inches.

*Pub. Serv. Comm'n*, 282 S.C. 430, 431, 319 S.E.2d 695, 696 (1984) (the party filing the petition before the Commission in a non-rate case has the burden of proof at trial and to offer rebuttal evidence).

- (4) Charter continues to have access to the utility poles of York under the current agreement between Charter and York existing since January 1, 2004, which is still legally in force and applicable.
- (5) Charter has no issue with the clearance standards for pole attachments used throughout York's service territory provided Charter is not paying for compliance. The issue is about cost and who bears the costs for compliance with the clearance standards used throughout York's service territory. S.C. Code Ann. section 58-9-3030(B)(2) (Supp. 2022).
- (6) The BAA clearly grants flexibility for the electric cooperative to consider safety, reliability and engineering standards with regard to its pole attachment agreements.  
*Id.*
- (7) We disagree with the Majority and find that the evidence in the record supports finding that York's 84-inch and 18-foot clearances are just and reasonable. York implemented its clearance changes or construction engineering standards for safety, reliability and generally applicable engineering principles. See, Hearing Exhibit 3 (EPB Exhibit No. 8); Tr. 190:23-192:1; Tr. 201:4-7; Tr. 207.5:11-15; Tr. 203:16-21; Tr. 207.10:7-10; and Tr. 207.8-207.9.
- (8) Charter failed to exhaust all of its administrative remedies when it did not seek an investigation by ORS. S.C. Code Ann. section 58-9-3030(C)(1) (Supp. 2022); Tr.

115; see also, *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973); *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966); *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010).

We continue to disagree with the Majority and to assert our position on the facts, law, and conclusion as explained in the Minority Option in Order No. 2022-836 and in this clarifying Minority Opinion in Order No. 2023-150. We believe that the General Assembly did not codify the NESC as the maximum standard for pole attachments when enacting the BAA and that nothing in the BAA prohibits an electric cooperative from using a standard greater than the minimum NESC requirements. We further believe that an electric cooperative with a standard greater than the minimum NESC requirements does not mean that the electric cooperative is denying access to its poles. We further believe that the findings, conclusions, and rulings in the Majority's Opinion and its Clarifying Opinion interpret the BAA to create a disadvantage for an electric cooperative when compared to an investor-owned utility by limiting the electric cooperative to the minimum NESC standards. As Charter's counsel stated in his opening statement, the concern in this complaint proceeding brought by Charter against York is that "[t]he whole thing here is about who pays" for the poles that must be added or used to accommodate the pole attachments for Charter to offer broadband services to York's electric co-op customer members that get electric service from York but are unserved by broadband communications providers. Tr. p. 29:10-30:7. Disagreeing with the Majority's decision

and its determinations which go beyond the single issue presented<sup>30</sup> and for the additional reasons set forth above, we believe Charter has not been denied access by York and that the petitions for rehearing and/or reconsideration of York, ECSC, and SCTC should be granted.

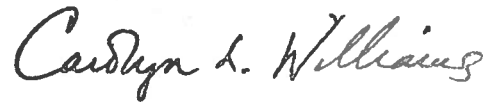
FOR THE MINORITY, COMMISSIONERS CASTON,  
THOMAS AND C. WILLIAMS



Stephen M. Caston, Commissioner  
Public Service Commission of  
South Carolina – District 3



Headen B. Thomas, Commissioner  
Public Service Commission of  
South Carolina – District 5



Carolyn L. Williams, Commissioner  
Public Service Commission of  
South Carolina – District 1

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<sup>30</sup> As stated in the Minority Dissenting Opinion in Order 2022-836, we believe that the other points made in Charter's argument for the first time in Rebuttal fosters concern about due process protections of all interested parties and should not be considered by the Commission without proper notice and opportunity for parties to conduct discovery and review as when the Petition was originally filed. Subject to this concern, we have addressed those matters as they may be relevant for clarity.